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In the Supreme Court of the United States

OCTOBER TERM, 1979

WESTVACO CORPORATION, ET AL., PETITIONERS

v.

ADAMS EXTRACT COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the Court's invitation of February 19, 1980.

QUESTION PRESENTED

Whether a participant in an antitrust price-fixing conspiracy may obtain contribution from other participants who have entered into settlements with the antitrust plaintiffs.

STATEMENT

1. Approximately three score private treble-damage actions initiated under Section 4 of the Clayton Act, 15 U.S.C. 15, were consolidated in the United States District Court for the Southern District of Texas *sub nom. In re Corrugated Container Antitrust Litigation*, M.D.L. No. 310. Alleging an 18-year nationwide conspiracy to fix the prices of corrugated containers and sheets, the Unified and Consolidated Complaint of plaintiffs named 37 corrugated container manufacturers as defendants, including petitioners.

On September 6, 1978, the district court certified a plaintiff class consisting of all purchasers of corrugated containers or sheets from defendants from January 1, 1960 to January 25, 1978. Thereafter, 29 defendants negotiated settlement agreements with plaintiffs providing aggregate compensation exceeding $300 million. Petitioners did not settle.

2. Petitioners moved the district court to permit either the assertion of contribution cross-claims against all settling defendants or affirmative defenses that would preclude plaintiffs from recovering the proportion of total damages attributable to the settling defendants. The district court denied the motions. Petitioners, the district court noted, wished to assert rights of contribution and claim-reduction defenses to alleviate the "inherently coercive" litigating environment created by their exposure to hundreds of millions of dollars in damages (Pet. App.

C-2). Observing that defendants representing approximately 80% of the relevant market had previously settled, the district court recognized (*id.* at C-2 to C-3) that petitioners sought insurance against ultimate damage liability in excess of their respective market shares or relative culpability in the price-fixing conspiracy.

For a number of reasons, however, the district court denied the motions. First, defendants would be discouraged from settling antitrust claims, the court explained, if they could be saddled with litigation over the identical claims in contribution actions maintained by non-settling defendants (Pet. App. C-3). Second, a right of contribution in antitrust cases might invite a proliferation of cross-claims that could make the litigation unmanageable, particularly since it might hinder or deter joint defense efforts which conserve judicial resources. The court noted (*ibid.*): "[i]t is difficult to judicially foresee how these cases, with the class and opt-out plaintiffs and thirty-seven defendants asserting cross-claims against each other, could be managed." Third, the court recognized (*id.* at C-4) that price fixing is an intentional antitrust violation and that contribution rights among intentional tortfeasors are ordinarily disfavored. Finally, the district court declared (*id.* at C-4, C-5) that if a rule recognizing a right of contribution were adopted, it should not be applied retroactively in this case to disturb settlement agreements executed by defendants in reliance on contrary judicial precedent. The court also denied petitioners'

motions to assert claim-reduction defenses.[1] It reasoned that there was no legal barrier to recovery by an injured plaintiff of "all his proven damages from any nonsettling joint intentional tortfeasor, less the amounts actually paid in settlement by other joint tortfeasors" (Pet. App. E-1 to E-2). The court entered a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure only with respect to the dismissal of the cross-claims for contribution.

3. On appeal, the court of appeals affirmed the judgment dismissing petitioners' cross-claims for contribution, relying in a brief per curiam opinion on its prior decision in *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), petitions for cert. pending *sub nom. Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, No. 79-1144 (filed Jan. 24, 1980). In *Abraham Construction*, the court held no right of contribution is assertable by an antitrust defendant against coconspirators, irrespective of whether the defendant's violation was intentional or unintentional. The court reasoned that a right of contribution would blunt the deterrent purpose of private treble-damage actions by reducing the maximum liability exposure of antitrust violators and by discouraging private enforcement of

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[1] "Claim reduction" is the reduction of the nonsettling defendants' liability by the portion of the total damages attributable to the settling defendants. The reduction in the liability exposure of the nonsettling defendants could be based on various theories or formulae, *e.g.*, comparative fault, apportionment among all defendants on an equal, or pro rata, basis, or apportionment on a market share basis.

the antitrust laws by escalating costs and complexity (604 F.2d at 901, 905-906). Acknowledging the possibility that denial of contribution might in some circumstances visit inequity on unintentional violators, the court held that this possibility does not justify a distortion of the antitrust laws (*id.* at 906). The court acknowledged that its rejection of contribution "is certaintly subject to reasonable contrary arguments," but in view of the "questionable benefits and * * * possible detriments" of the new rule requested, it concluded that the defendants should seek the new law from Congress, a forum better suited to evaluation of the competing interests and policies involved (*ibid.*).

In *Abraham Construction*, Judge Morgan dissented in part. He agreed with the denial of the right of contribution to defendants who intentionally violated the antitrust laws. He reasoned, however, that denying rights of contribution to unintentional violaters would not buttress deterrence (604 F.2d at 906-907). Moreover, he stated, district courts could be expected to employ the procedural mechanisms authorized by the Federal Rules of Civil Procedure to shelter a plaintiff's treble damage action from the costs and complications of corollary contribution claims asserted by a defendant (*id.* at 907-908). Hence, rights of contribution would not jeopardize incentives for treble damage suits (*id.* at 908). Accordingly, Judge Morgan concluded (*ibid.*), "[a]bsent more convincing proof that a limited contribution rule would compromise the effectiveness of the antitrust laws, I

would not force a defendant guilty of no conscious wrongdoing to bear total responsibility for the sins of many."

4. In the present case, the court of appeals refused to address the question of whether petitioners Westvaco and Packaging Corporation of America (PCA) could assert defenses of claim reduction. Since the district court had declined to enter a final judgment disposing of the issue, it reasoned, appellate jurisdiction was wanting (Pet. App. B-2).[2]

DISCUSSION

1. The decision of the court below[3] conflicts in principle, although not necessarily in result (see pages 15-16, *infra*), with the decision of the court of appeals for the Eighth Circuit in *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (1979). There the Eighth Circuit held that federal law provides a right of contribution by an antitrust defendant against companion violators

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[2] The district court stated it would withhold final decision on the claim-reduction question until the case is submitted to a jury (Resp. Brief in Opp. App. B 12).

[3] See also *Iowa Beef Processors, Inc.* v. *Spencer Foods, Inc.*, 1980-1 Trade Cases (CCH) ¶ 63,021 (5th Cir. 1979) (following the ruling in *Abraham Construction*), petition for cert. pending *sub nom. Iowa Beef Processors, Inc.* v. *Meat Price Investigators Ass'n*, No. 79-1214 (filed Feb. 6, 1980). The *Abraham Construction* decision left open the question whether an antitrust defendant possesses an independent cause of action against co-conspirators who employed coercion or collusion to escape suit by the treble-damage plaintiff. 604 F.2d at 901-902.

in circumstances where contribution would promote fairness among the wrongdoers without undermining the deterrent effect Congress sought to achieve by providing for private treble-damage actions.[4] The court reasoned that an unbending rule against contribution would undercut the deterrent effect of the treble-damages provisions by offering antitrust violators a hope of escaping damage liability completely (594 F.2d at 1185). It observed that procedural mechanisms such as severance were available to protect a plaintiff's treble damage suit from the complications raised by third-party claims for contribution (*id.* at 1184). Finally, it stated that fairness and reason frown on a "rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer" (*id.* at 1185-1186). The court held that the contribution issue should be decided in light of all the circumstances in a particular case, including those identified in another context in Mr. Justice White's concurring opinion in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 146-147 (1968).[5] Noting that the case before

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[4] Except in "unusual circumstances," the court endorsed a rule of pro rata contribution among joint violators to avoid the complexities and threat to antitrust deterrence inherent in a comparative-fault standard. 594 F.2d at 1182 n.4.

[5] In determining whether a treble-damage plaintiff's participation in an antitrust violation should bar recovery against a joint violator, Mr. Justice White stated that the following

it did not involve a joint tortfeasor who had settled in good faith, the court stated that "in the proper case the court should be able to fashion a rule of contribution which will protect the rights of settling defendants" (594 F.2d at 1184). In dissent, Senior District Judge Hanson maintained that the arguments were inconclusive on whether contribution would enhance or reduce the deterrent effect of the private-damage remedy. Consequently, he deemed it unwise to recognize a right of contribution since such a right could dampen the incentives for treble-damage actions by complicating issues and the trial court's managerial tasks. Finding no strong policy favoring contribution and a possible adverse effect from recognizing such a right, he concluded that "this is an appropriate instance to await congressional directive" (*id.* at 1189-1190).

The Tenth Circuit, in *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cases (CCH) ¶ 62,995 (1979), denied contribution to an intentional antitrust violator allegedly responsible for only 11% of the purchases tainted by conspiracies to fix prices and to monopolize, rehearing *en banc* granted and

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should be considered: "facts as to the relative responsibility for originating, negotiating, and implementing the scheme; evidence as to who might reasonably have been expected to benefit from the provision or conduct making the scheme illegal under § 1 [of the Sherman Act]; proof of whether one party attempted to terminate the arrangement and encountered resistance or counter-measures from the other; facts showing who ultimately profited or suffered from the arrangement" (392 U.S. at 146-147).

pending, No. 77-2068 (Dec. 27, 1979).[6] Unlike the Fifth Circuit, however, it held open the possibility that an "unintentional violator," in certain circumstances, might be entitled to contribution.[7] See *id.* at 79,704 n.15.

2. The question presented is substantial. The threshold issue is whether, and the extent to which, the federal courts in exercising their federal common-law powers have the authority to create a private right of action for contribution under the antitrust laws. On the one hand, this Court has held that federal courts are empowered in certain circumstances to create legal rules, rights and defenses under federal common law in furtherance of federal interests acknowledged in statutes or the Constitution.[8] Indeed the Fifth, Eighth, and Tenth Circuits

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[6] Judge Holloway dissented from the majority's refusal to permit contribution claims by intentional wrongdoers.

[7] The Seventh Circuit in *Heizer Corp.* v. *Ross*, 601 F.2d 330, 333 (1979), a securities case, voiced support for the fairness rationale advanced by the Eighth Circuit in *Professional Beauty Supply* to justify a rule permitting contribution in appropriate circumstances. *Heizer* held that a right of contribution is available to joint violators of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j, and Rule 10b-5 issued thereunder.

[8] See, *e.g.*, *Carlson* v. *Green*, No. 78-1261 (Apr. 22, 1980), (recognizing damage action for violation of the Eighth Amendment proscription of cruel and unusual punishments); *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (recognizing damage action for violation of Fourth Amendment rights); *Davis* v. *Passman*, 442 U.S. 228 (1979) (recognizing damage action for violation of Fifth Amendment protection against gender discrimination); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 103-108 (1972) (endorsing a

apparently assumed that such authority exists in the cases we have discussed. On the other hand, it is arguable that a right to contribution in this statutory context may be fashioned by the courts, if at all, only as an implied right of action under the Sherman Act or the Clayton Act and not in the exercise of the limited common-law powers of the federal courts. See *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285 (1952); *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). If so, an implied right of action for contribution would arguably be inconsistent with the four-factor test of *Cort* v. *Ash*, 422 U.S. 66, 78 (1975).[9]

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federal common law of nuisance); *Snepp* v. *United States*, Nos. 78-1871 and 79-265 (Feb. 19, 1980) (imposing fiduciary duties on certain government employees and a constructive trust on the profits obtained from a violation of such duties); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957) (directing courts to apply federal common law in contract actions arising under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185); *Vaca* v. *Sipes*, 386 U.S. 171, 197 & n.18 (1967) (acknowledging power to fashion a rule of joint and several liability for violations of a statutory duty of fair representation and breach of contract); *United States* v. *Glaxo Group Ltd.*, 410 U.S. 52, 57-60 (1973) (recognizing right of the United States to attack the validity of a patent in antitrust litigation where the patent would be an obstacle to fashioning appropriate relief); *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942) (permitting a patent licensee to assert a defense of illegality under the Sherman Act in a contract action by the licensor seeking unpaid royalties).

[9] For example, it could hardly be said that an antitrust violator is, in that capacity, an intended beneficiary of any of the antitrust laws. See 422 U.S. at 78. Compare *Perma Life*

Under the latter view, only Congress and not the federal courts, would be empowered to establish a right of contribution in antitrust cases. Cf. *Perma Life Mufflers, Inc.* v. *International Parts Corp., supra,* 392 U.S. at 138, 139.

A third possibility would be to hold that failure of an implied right of contribution to meet the standards of *Cort* v. *Ash* would not wholly deprive the courts of power to order contribution, but would be a reason substantially to restrict the exercise of such power—for example, to only the most compelling circumstances in order to avoid manifest injustice. A rationale for the approach might be that the standards of *Cort* v. *Ash* should govern any attempt to seek contribution in alleged furtherance of the policies of the antitrust laws or as a routine matter in antitrust litigation, but that, apart from those standards, the courts may properly supplement the remedies authorized by the antitrust laws to prevent peculiar injustices that Congress may not reasonably have foreseen in anticipating the ordinary application of those laws.

If the federal courts have the authority to fashion a right of contribution in antitrust cases, the next question is the extent to which, if at all, such a right should be recognized. Here too the question is substantial. On this issue, a number of factors have been examined by the courts in antitrust cases: (i)

Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 (1968) (permitting a treble-damage claim by a participant injured by the violation).

the impact of a rule of contribution on deterrence of antitrust violations, (ii) the extent to which a rule of contribution would make private actions unmanageable, and (iii) the extent to which denial of contribution is unfair. Concerning deterrence, the Eighth Circuit concluded that contribution would enhance the deterrent effect of the antitrust laws by insuring that no violator goes "scot free." 594 F.2d at 1185. The Fifth Circuit, however, concluded that a rule of contribution would lessen deterrence by decreasing maximum damage exposure. 604 F.2d at 901.[10] While there is at present little empirical evidence on which to base a judgment, we think the Fifth Circuit is more likely correct. We think it unlikely that many violators, particularly large firms, are encouraged to violate the law in the belief that if the violation is discovered they will get off free while somebody else will be stuck with the damage tab. To the extent that the no-contribution rule has any effect on potential intentional violators, we think it more likely that the possibility of having to pay a disproportionately large share of the damages encourages adherence to the law. At the least, we think it unlikely that recognizing a right of contribution would increase the deterrent effect of the law. In-

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[10] The knowledge that all of one's conspirator-competitors will have to pay damages also may reduce the deterrent effect since a violator need not worry that it could be competitively disadvantaged if it had to pay a disproportionately large damage award.

deed, a soon-to-be-published legal and economic analysis of the question concludes that it would not.[11]

Concerning the complicating effect of a right of contribution on litigation manageability, both circuits recognized that allowing contribution might increase litigation complexity to the detriment of both plaintiffs and the courts.[12] The Eighth Circuit felt, however, that unfairness to plaintiffs could be avoided by the appropriate use of severance and other litigation management powers possessed by the district courts. 594 F.2d at 1184. The Fifth Circuit was not so sanguine; it feared that at least some adverse impact on litigation management would result despite the best efforts of the district courts. 604 F.2d at 905-906. It is our view that a right of contribution would entail substantial risks for both plaintiffs and the courts of increased complexity in private damage litigation.[13]

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[11] Easterbrook, Landes, and Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, presently scheduled for publication in the October 1980 issue of The Journal of Law and Economics.

[12] This Court has expressed concern over rules that might unduly complicate the treble-damage remedy and thereby reduce its effectiveness. *E.g., Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 732, 740-745 (1977); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 489 (1968).

[13] If sued defendants are allowed to implead additional defendants, the size and complexity of the plaintiff's typically formidable litigation burdens certainly will increase even more. Moreover, if a right of contribution is recognized, companies not named as defendants might seek to intervene

Concerning fairness, both circuits recognize that imposing a damage burden on some defendants in excess of their relative fault or benefit received while allowing other violators to go "scot free" or to pay lesser damages, may seem unfair. Similarly, both courts agreed that under a no-contribution rule there is a possibility (which we would regret) that some innocent defendants might be coerced into settling because of the increased liability to which they are exposed as a result of earlier settlements.[14] The Fifth

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where plaintiff has charged an industry-wide conspiracy. Such potential intervenors may believe their chances of defeating the plaintiff are better than their chances of beating the original defendants, who are likely to know better than the plaintiff the identity and role of all the co-conspirators. Moreover, as the district court in this case noted (Pet. App. C-3), any adversary relationship between the defendants may deprive the courts of at least some of the liitgation efficiencies engendered by joint defense efforts. Even if settling defendants are protected from contribution, allowance of a claim-reduction defense will increase the plaintiff's litigation burdens. In addition to proving a violation and the total amount of damages suffered, class plaintiffs also would have to litigate additional issues relevant to the share of the total damages attributable to settling and nonsettling defendants. Absent a rule by which total damages are allocated on a pro rata basis between settling and nonsettling defendants, class plaintiffs will have to litigate the allocation of damages among all defendants to protect their claims from being unduly reduced by overstatements of the settling defendants' share of the market.

[14] This concern arises as much from the lack of a claim reduction defense as the no-contribution rule. If the total damages found were reduced by the amount attributable to the settling defendants, under one of several formulae, the liability exposure of any innocent (or remaining guilty) defendant would be reduced. On the other hand, such a rule would reduce incentives for settlements.

Circuit concluded, however, that the incidence of such unfair results has not been sufficient to warrant sacrificing antitrust deterrence or risking increased litigation complexity. The Eighth Circuit, having reached different conclusions on the deterrence and litigation manageability questions, deemed the elimination of unfair results a sufficient reason to recognize a right of contribution in some circumstances. While we recognize that contribution arguably may enhance fairness in some circumstances, we do not regard as in itself unfair the principle of joint and several liability for the consequences of concerted intentional misconduct—which is the general rule for both criminal and tort liability in our legal system.

In short, the question whether a rule of contribution is warranted is a substantial question.

3. Although a very real conflict exists on the general issue of contribution, the immediate case does not necessarily present an occasion to resolve the conflict. Since this case involves settling defendants charged with price-fixing—an obviously intentional antitrust violation [15]—it is probable that the Eighth Circuit would have reached the same result here as did the Fifth Circuit.[16] As mentioned, the Eighth Circuit indicated that it would not enforce contribution against settling defendants. 594 F.2d at

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[15] Traditionally, contribution has not been allowed for intentional torts. See *Restatement (Second) of Torts* § 886 (A) (3) (1979).

[16] The other two cases presently pending on petition in this Court (see note 3, *supra*) similarly involve price fixing.

1184. But, since we believe that postponement of review by this Court will result in a considerable expenditure of judicial resources and forum shopping without a commensurate increase in elucidation of the issues, staying review for a more propitious case would be a costly procedure for both the judiciary and litigants.[17]

We believe certiorari should be granted. No matter how the Court were to resolve the issues, either by holding that the federal courts lack power to establish a right of contribution in antitrust cases, or by upholding the courts' authority, be it broad or narrow, to create such a right, the Court's discussion of the relevant factors in fashioning a rule of contribution would provide much-needed guidance to the lower courts as such cases arise.

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[17] The propriety of recognizing a right of contribution in antitrust cases clearly has divided the appellate judges who have ruled on this issue. It is likely that the issue will be raised with increasing frequency in private antitrust litigation, both in those circuits which have not ruled on the issue and in those which allow it. An authoritative resolution of the issues by this Court would thus save judicial resources, foster the uniformity desired on a question of federal law, and avoid forum shopping.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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